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No. 85-2099

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In The  
SUPREME COURT OF THE UNITED STATES  
October Term, 1986

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COMMONWEALTH OF PENNSYLVANIA,  
Petitioner,

v.

DOROTHY FINLEY,  
Respondent.

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ON WRIT OF CERTIORARI TO THE  
SUPERIOR COURT OF PENNSYLVANIA

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BRIEF OF THE NATIONAL LEGAL AID AND  
DEFENDER ASSOCIATION, AMICUS CURIAE  
IN SUPPORT OF RESPONDENT

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NATIONAL LEGAL AID AND  
DEFENDER ASSOCIATION  
1625 K Street, NW  
Washington, D.C. 20006

By: DAVID P. BERGSCHNEIDER  
Office of the State  
Appellate Defender  
300 East Monroe, Suite 102  
Springfield, IL 62701  
(217) 782-3654

COUNSEL FOR AMICUS CURIAE

34P16

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INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a private, non-profit, national membership organization headquartered in Washington, D.C., whose purpose is to insure the availability of

quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases, and 586 defender offices engaged in providing representation to indigents arrested on criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel plans and private practitioners.

NLADA is vitally interested in assuring that indigent criminal defendants are guaranteed access to state collateral remedies similar to that enjoyed by criminal defendants who are not indigent. In this case, the Court will decide whether an indigent who is appointed counsel under a state statute

which guarantees the assistance of counsel for an initial post-conviction petition is afforded the protections required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment where, without notice to his client that she may respond, the attorney informs the trial court that there is no merit to the post-conviction petition. NLADA respectfully requests this Court to consider its brief on this significant public question.

#### STATEMENT OF THE CASE

Ms. Finley was convicted in 1975 on a number of counts, including murder. In her appeal of right to the Pennsylvania Supreme Court, she challenged the sufficiency of the evidence and the admissibility of search and seizure evidence.



The conviction was affirmed. Commonwealth v. Finley, 477 Pa. 211, 383 A.2d 898 (1978).

Ms. Finley filed a petition for post-conviction relief under the Pennsylvania Post-Conviction Hearing Act. This petition was denied without a hearing and without the appointment of counsel. On appeal, the Pennsylvania Supreme Court held that state law requires that counsel be appointed for an indigent on her first post-conviction petition. 497 Pa. 332, 440 A.2d 1183 (1981). The case was remanded for appointment of counsel.

A lawyer was assigned, and informed the trial court that in his opinion there were no arguably meritorious issues in the post-conviction petition. Counsel was instructed to review the entire record and applicable law, and to interview Ms. Finley to ascertain any

additional issues. Counsel was informed that if he still concluded that the record was devoid of any arguable contentions, he should specify by letter not only the nature and extent of his review, but also the issues which Ms. Finley wished to have raised and an explanation why those issues lacked merit. (J. A. 13-14)

Subsequently, counsel wrote to the trial court indicating that he had reviewed the "Notes of Testimony" and met with the defendant, but could find no issues which were arguably meritorious. Counsel indicated that Ms. Finley did not wish to raise any issues other than those in the pro se petition, and that those issues were in his opinion without merit because one had been litigated on direct appeal and the other involved questions of the credibility of witnesses. (J.

A. 9) In response to counsel's letter, Ms. Finley's post-conviction petition was dismissed. (J. A. 17)

The Superior Court of Pennsylvania found that counsel's letter did not comply with the requirements of Anders v. California, 386 U.S. 738 (1967), and remanded the cause for a new hearing. 330 Pa. Super. 313, 479 A.2d 568 (1984). The Pennsylvania Supreme Court granted leave to appeal, then dismissed the grant as improvident. 507 A.2d 822 (1986). This Court granted the State's petition for a writ of certiorari.

#### SUMMARY OF ARGUMENT

Although a state is not required to provide a system of post-conviction collateral review in criminal cases, once it chooses to do so it must meet the

requirements of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Due Process Clause requires that a state treat its citizens in a fair and nonarbitrary manner, while the Equal Protection Clause demands that groups of similarly situated persons not be treated in an unequal manner.

The practice utilized to dismiss Ms. Finley's post-conviction petition violated the Due Process Clause because Ms. Finley was not notified of her counsel's motion to withdraw in time to allow her to respond, and because counsel was not required to demonstrate that he had comprehensively examined the record and sought to present any issues available. While the formal requirements of Anders v. California may not necessarily apply, fundamental fairness requires that a post-conviction petitioner be notified

of her counsel's intent to withdraw and that there be a sufficient basis for the court to determine that counsel's evaluation of the merits is accurate.

The procedure used in this case also violates the Equal Protection Clause because it deprives indigent persons of reasonable access to the courts, in that it gives appointed counsel, rather than the judicial system, the power to determine whether a post-conviction petition is meritorious.

Because the procedure under which Ms. Finley's post-conviction petition was dismissed violates both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the relief granted by the lower court should be affirmed.

#### ARGUMENT

WHERE A STATE ELECTS TO PROVIDE A SYSTEM OF COLLATERAL REVIEW WHICH INCLUDES THE RIGHT TO APPOINTED COUNSEL, THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT ARE VIOLATED WHERE A PETITION IS DISMISSED UPON COUNSEL'S SUMMARY ASSERTION, WITHOUT NOTICE TO THE DEFENDANT, THAT THERE ARE NO MERITORIOUS ISSUES.

Contrary to the Commonwealth's assertion, the primary question involved in this case is not whether the requirements of Anders v. California, 386 U.S. 738 (1967), should be extended to state collateral proceedings. Instead, this case presents a question under a separate area of Fourteenth Amendment law -- once a state has chosen to provide a remedy which is not constitutionally required, under what circumstances may it withdraw that remedy from certain of its citizens? Interests of fundamental fairness and



equal protection mandate that a state which has elected to provide indigents with counsel for post-conviction review not deprive them of their right to such review without notice and an opportunity to respond, and without insuring that counsel has comprehensively reviewed the case and attempted to argue every meritorious issue.

Although there is no constitutional requirement that a state establish a system of collateral review, United States v. MacCollom, 426 U.S. 317 (1976) (plurality opinion), once a state decides to establish such a system, it must comply with the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In Evitts v. Lucey, 469 U.S. 387 (1985), this Court considered a case in which a state's rules of appellate procedure required dismissal of an appeal

because of counsel's failure to file a necessary document. The State specifically argued that because it was not constitutionally required to establish any right to appeal, the operation of the system which it chose to establish was immune from constitutional scrutiny. This Court rejected this argument, finding that although there is no requirement that a state provide appellate review, once it chooses to do so it must conform with due process and equal protection requirements. 469 U.S. at 401.

Similarly, in Griffin v. Illinois, 351 U.S. 12 (1956), this Court held that although Illinois was not required to provide any right to appeal, it could not administer its appellate system in a manner which discriminated against persons on the basis of poverty. The

Griffin court concluded that because Illinois had made appellate review an integral part of its criminal justice system, due process and equal protection considerations applied to criminal appeals, and indigents could not be denied the right to appeal because they could not afford to purchase a transcript. 351 U.S. at 18. In Burns v. Ohio, 360 U.S. 252 (1959), this Court again held that although Ohio was not obligated to establish an appellate system, once it chose to do so it could not foreclose indigents from that system by requiring that a filing fee be paid. 360 U.S. at 257.

Although Evitts, Griffin, and Burns involved direct appeals from state convictions, this Court has often held that state collateral remedies are also subject to the Fourteenth Amendment.

Smith v. Bennett, 365 U.S. 708 (1961), invalidated a state requirement that an application for writ of habeas corpus could be docketed only if a filing fee was paid. Because the right to file for a writ of habeas corpus was a "critical right" which Iowa had extended to all prisoners, this Court found that the Equal Protection Clause prohibited restrictions on the writ's availability which were based on indigency. 365 U.S. at 712.

In Lane v. Brown, 372 U.S. 477 (1963), the defendant sought to appeal the trial court's denial of his application for a writ of error coram nobis. Under Indiana law only the Public Defender could request a transcript for appeal, and the Public Defender refused to make such a request because he believed that any appeal would be unsuccessful. This

Court reiterated that the Fourteenth Amendment applies to state systems of appellate or post-conviction review, and found that the Equal Protection Clause was violated where a state statute permitted the Public Defender to deprive an indigent of his state right to an appeal. 372 U.S. at 485.

The Commonwealth of Pennsylvania has, in its discretion, provided a Post-Conviction Hearing Act as an essential part of its criminal justice system. In addition, Pennsylvania has provided indigent petitioners with the right to court-appointed counsel on their first petitions.<sup>1</sup> The issue in this case, therefore, is whether the procedure under

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<sup>1</sup> Commonwealth v. Finley, 497 Pa. 332, 440 A.2d 1183 (1981); Pa. R. Crim. P. 1503-1504.

which Ms. Finley's post-conviction petition was dismissed comports with the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

The Due Process and Equal Protection Clauses protect separate interests and involve distinct inquiries. The Due Process Clause emphasizes the degree of fairness in dealings between the state and the individual, without regard to how other individuals in the same situation are treated. The Equal Protection Clause, by contrast, concerns itself with the disparity in treatment between classes of individuals who are similarly situated. Evitts v. Lucey, 469 U.S. 387, 405 (1985). See also Ross v. Moffitt, 417 U.S. 600, 609 (1974) (neither due process nor equal protection requires appointment of counsel on discretionary state appeals.) Prior decisions which

have applied the Fourteenth Amendment to state appellate and post-conviction procedures have relied upon both clauses. In Griffin v. Illinois, 351 U.S. 12 (1956), for example, the Court held that the requirement that a defendant pay for his own transcript in order to obtain an appeal violated the Equal Protection Clause because it deprived a poor person of an equal opportunity to appeal his conviction. In addition, the Illinois practice violated the Due Process Clause because it allowed an appeal to be decided in an arbitrary fashion, in that success or failure depended not upon the merits of the issues but upon whether the defendant could afford a transcript. Evitts v. Lucey, supra, 469 U.S. at 403-404. See also Ross v. Moffitt, supra, 417 U.S. at 608-609.

The practice in question here violates both due process and equal protection because it results in dismissal of post-conviction petitions on an arbitrary and fundamentally unfair basis, and because it permits an unacceptable disparity between the treatment of post-conviction petitions filed by indigents and those filed by nonindigents. The procedure utilized in this case is arbitrary and unfair because, as the lower court noted, there is no indication that Ms. Finley was served with a copy of her attorney's letter advocating the dismissal of her appeal and informed that she could respond. 479 A.2d at 571. Certainly an indigent who had been appointed counsel would reasonably expect that her attorney would advocate only positions which would justify a reversal of her conviction. At



the minimum, she could rely on her attorney not to argue that her case lacked merit. In order to be fundamentally fair, a procedure which allows appointed counsel to withdraw should require notice to the defendant which informs her that she may seek other counsel or respond on her own.<sup>2</sup>

The trial court's procedure was also fundamentally unfair because, although Pennsylvania has recognized that the assistance of counsel is of such importance to post-conviction petitioners that counsel should be appointed at public expense where the petitioner is indigent,

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<sup>2</sup> See also Enteminger v. Iowa, 386 U.S. 748 (1967), in which this Court found unconstitutional a state statute which permitted counsel to file only a partial record on appeal without notifying the defendant of his decision that a complete record was unnecessary.

a proceeding can be dismissed without any assurance that counsel has performed his obligation to examine the record fully and determine whether any issues can be argued. The letter filed in this case stated only that counsel had examined the "Notes of Testimony" rather than the entire record, and contained no discussion of the applicable law or explanation of counsel's conclusion that the issues were meritless. It cannot be concluded from this record that counsel thoroughly examined the record and researched the law before determining that there were no issues to be raised. Therefore, it cannot be determined that Ms. Finley received the assistance of counsel contemplated by the Commonwealth of Pennsylvania when it extended the



right of appointed counsel to all indigents.<sup>3</sup>

Due process requires that criminal proceedings be conducted in accordance with "prevailing notions of fundamental fairness." California v. Trombetta, 467 U.S. 479 (1984). Certainly prevailing notions of fundamental fairness are violated by a procedure which permits an individual's post-conviction petition to be dismissed upon her attorney's summary assertion that her issues lack merit. Should this Court find that Anders v. California need not be applied to this situation, it should at a minimum require counsel to establish that he has examined

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<sup>3</sup> Under the circumstances of this case the adequacy of counsel's review is especially open to question in light of appellate counsel's identification of several issues which were arguably meritorious. 479 A.2d 572-573.

the entire record, thoroughly researched all possible issues, served the petitioner with a copy of his motion to withdraw, and informed her that she may communicate directly with the court. Any lesser requirement does not insure fundamental fairness in dealings between the State and the individual petitioner.

The procedure utilized in this case also violates the Equal Protection Clause of the Fourteenth Amendment because it results in disparity of treatment based upon poverty and denies indigents reasonable access to the Pennsylvania post-conviction system. Where a state elects to provide a remedy which is not constitutionally required, the Equal Protection Clause requires that indigents have a reasonable opportunity to present their claims to a court of competent

jurisdiction. Ross v. Moffitt, supra, 417 U.S. at 612; United States v. MacCollom, supra, 426 U.S. at 324.

Under the Pennsylvania system, convicted persons with means to hire counsel will receive the benefit of counsel's investigation and research, will have their post-conviction claims presented and argued in the most favorable light, and will have the merits of those claims determined by the trial court. It is highly unlikely that an individual with privately-retained counsel will discover, as Ms. Finley did in this case, that her attorney has moved to withdraw and informed the court that the post-conviction claims are without merit. Therefore, permitting dismissal of a post-conviction claim merely on the assertion of counsel means that, in practice, only persons without sufficient

resources to hire their own attorneys will have their petitions dismissed without having the merits of those petitions examined by a judge.

Furthermore, dismissal of a post-conviction petition on counsel's assertion of lack of merit may preclude a petitioner from ever having those issues litigated. For example, Pennsylvania law allows summary dismissal, without the appointment of counsel, of petitions which raise issues which were the subject of previous petitions. Commonwealth v. Finley, 497 Pa. 332, 440 A.2d 1183 (1981); Pa. R. Crim. P. 1504. Therefore, appointed counsel's determination that issues have no merit, if accepted by the trial court, may well prevent even meritorious issues from being considered

at a later time.<sup>4</sup>

In essence, the procedures in this case mirror those found constitutionally

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<sup>4</sup> Several states which provide post-conviction remedies have similar provisions barring consideration of claims which were raised in previous petitions. For example, Illinois law expressly provides that any issues not raised in the initial post-conviction proceeding are waived. Ill.Rev.Stat., 1985, Ch. 38, §122-3. See also, e.g., Ark. R. Crim. P. 37.2(b) (any ground not raised in original proceeding is barred from subsequent petition); Del. Super. Ct. Crim. R. 35(a) (court need not entertain successive motions which request relief which was denied in earlier petition); Mo. Sup. Ct. R. 27.26 (court "shall not entertain" successive motions where ground for relief could have been raised in original motion); Neb. Rev. Stat., Ch. 29, §29-3001 (successive petitions need not be entertained unless grounds relied upon in second petition were not available at time of original motion, see State v. Ohler, 366 N.W.2d 771 (1985)); Ky. R. Crim. P. 11.42(3) (final disposition of motion for collateral relief bars all issues which could reasonably have been presented.)

unacceptable in Lane v. Brown, 372 U.S. 477 (1963). In Lane, Indiana law provided that the Public Defender be assigned to represent all indigents on appeal, and that only the Public Defender could obtain a transcript at public expense. The petitioner sought representation on appeal, but the Public Defender, believing that an appeal would be unsuccessful, declined to either enter an appearance or request the transcript. In finding that the Indiana practice violated equal protection, this Court held that a state could not, based solely on indigency, confer upon appointed counsel the power to deprive the defendant of a remedy which the State provided as a matter of right.

The procedure used in this case suffers from the same deficiency. Pennsylvania law allows all convicted



persons the right to file a post-conviction petition, and provides that indigents shall have the assistance of court-appointed counsel. By dismissing the petition merely upon counsel's representation that it lacked merit, however, the trial court permitted a non-judicial officer to make a final and unreviewable determination of Ms. Finley's post-conviction rights.

Even if Anders v. California does not apply to this situation because there is no federal right to the assistance of counsel, the interests underlying the Anders decision are similar to those involved where the state elects to extend the right to counsel in collateral proceedings. Therefore, in order to insure that indigents receive the same degree of protection as do nonindigents and have their post-conviction petitions

decided on the merits rather than arbitrarily, appointed counsel who seeks to withdraw should be required to indicate the extent of his examination of the record and the law, what possible issues were considered, and what led him to conclude that the issues were without merit. Furthermore, counsel should be required to show that the defendant has been made aware of the motion to withdraw and her right to respond. Adoption of such requirements will assure that indigents receive fair and equal treatment under state collateral procedures without unduly burdening appointed counsel, who will only be required to memorialize the process which led him to conclude that the issues lacked merit. Furthermore, such a procedure will provide the state courts with a sufficient record on which to evaluate

counsel's determination of the merits and thus insure that post-conviction claims will be decided by judicial officers rather than by appointed counsel.

#### CONCLUSION

Even assuming that the requirements of Anders v. California need not be applied to state collateral review proceedings because there is no federal constitutional right to the assistance of counsel, the interests underlying the Anders decision are similar to those protected by the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Therefore, this Court should require that where a state has elected to provide appointed counsel for indigents in post-conviction proceedings, such counsel should not be permitted to withdraw because the issues lack merit unless he informs the court of the extent to which the record has been examined and what issues might be raised, and notifies the defendant of her right to respond in sufficient time to allow such a response.



Such a procedure would satisfy the requirements of due process and equal protection without unduly burdening either appointed counsel or the state court systems.

For the above-stated reason, this Court should affirm the relief granted below.

Respectfully submitted,

NATIONAL LEGAL AID AND  
DEFENDER ASSOCIATION  
1625 K Street, NW  
Washington, D.C. 20006

By: DAVID P. BERGSCHNEIDER  
Office of the State  
Appellate Defender  
300 East Monroe, Suite 102  
Springfield, IL 62701  
(217) 782-3654